In the Matter of:

KEITH LUCADO,
Claimant,
v.

HARBERT YEARGIN,
Employer,

LIBERTY MUTUAL INSURANCE CO.,
Carrier.

DATE: December 11, 1998

CASE NO. 1998-LHC-0152

OWCP NO. 15-38704

George Benz, Esq.
300 Esplanade Dr., Suite 1160
Oxnard, California 93030
For the Claimant

Kurt A. Gronau, Esq.
733 Bishop St., Suite 2775
Honolulu, Hawaii 96813
For the Employer/Carrier

Before: ALFRED LINDEMAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a matter under the Defense Base Act extension to the Longshore and Harbor Workers' Compensation Act (hereinafter referred to as "the Act"). 42 U.S.C. § 1651 *et seq*.; 33 U.S.C. § 901 *et seq*.; 20 C.F.R. Parts 701, 702; 29 C.F.R. Part 18. A hearing on the merits of the claim was held in San Francisco, California, on June 23, 1998.

The contested issues presented for adjudication are: 1) claimant's average weekly wage at the time of his work-related injury which he sustained on May 12, 1994, while playing softball on Johnston Atoll; 2) the nature and extent of claimant's work-related disability, if any, from May 21, 1997 to the present; 3) the imposition of a "penalty" on the employer/carrier under section 14(e) of the Act based on the suspension of voluntary compensation payments from May 21, 1997, to July 16, 1998; and 4) the employer/carrier's entitlement to a credit for advances of compensation paid to claimant.

Findings of Fact and Conclusions of Law

The essential facts underlying this claim are that claimant, who is 38 years old, started working as an industrial painter for Harbert Yeargin, dba Raytheon Engineers and Constructors, at Johnston Atoll, an ammunition disposal site in the Pacific Ocean, in September of 1993, TR 36-39;[1/] that claimant's job involved corrosion painting and maintaining the premises, TR 38; EX 7 at 25; that he was hired in a temporary position and told that the position would probably be made permanent if the employer liked him, TR 37, 67; that discussions regarding a permanent position took place between claimant and the employer one month prior to the accident,[2/] TR at 74; that claimant sustained a compensable industrial injury to his head and neck on May 12, 1994, when he collided with a co-worker while playing softball, TR 69; that claimant received eight stitches at the dispensary immediately following the accident and, the next day, began to suffer from headaches, soreness in the neck, pains in his left arm like an "electrical shock," sweaty palms and salivation, TR 69; that he did not work during the week following the accident because a work policy forbids working with an open wound, because of potential exposure to contaminants, TR 70; that during that same week he was informed he was being laid off from his position as an industrial painter, due to reductions in force, but was offered and refused a position as a rubber ranger,[3/] TR 72; that six days after the accident, he returned home to Lompoc, California, as part of a normal rotation for leave,[4/] TR 69-70; that since the date of injury he has been treated for severe cervical thoracic strain, left C-6 radiculopathy, myofascial pain, headaches, and a herniated disc at the C/5-6 level. TR at 41, CX 6 at 17; CX 7 at 29-30; CX 8, 11; EX 4 at 15, 5, 9 at 330, 12 at 75; that from July 17, 1996, to March of 1997, he was referred to, and underwent vocational rehabilitation as a computer technician,[5/] and within a few months thereafter secured a temporary position as a computer technician with Hayward Lumbar, TR 17; that on June 12, 1997, when he completed the temporary work at Hayward Lumbar, he was offered a position in the yard, which he refused because of his physical condition, TR 17, 62-63; that

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[1/] "TR," "CX" and "EX" refer, respectively, to the transcript of the hearing, claimant's exhibits and the employer/carrier's exhibits.

[2/] Claimant was offered and refused a permanent position once, a few months before the accident, and was asked if he would like a permanent position again one month before the accident, to which he responded affirmatively. TR 74.

[3/] Claimant testified that he was the only employee laid off due to "force reductions" at that time. TR 77. The position of rubber ranger involves cleaning up residue from the incineration area and other areas of the plant that contain toxic substances. Claimant was told he could continue to work in this capacity, but that he "probably wouldn't want to do that because that's not [his] type of work." TR 72.

[4/] The record indicates that claimant had planned a trip home prior to his injury, fully intending to return to work, having purchased round-trip tickets to leave Johnston Island on May 18, 1994, and return two weeks later. TR 69-70; "Employer's Pre-Trial Brief" at 2.

[5/] On the advice of vocational rehabilitation counselor, Mary Barncastle, claimant enrolled and successfully completed courses at Coastal Valley Junior College from September 16, 1996, through March 7, 1997. EX 7 at 25; TR 17; "Employer's Post-Trial Brief" at 5. Claimant received straight A's for his coursework, and the Director of claimant's program described him as a "model student." EX 7 at 28, 112.

he was unsuccessful at securing other employment as a computer technician despite sending out resumes; that he continued to suffer from severe neck pain with radiation into one arm at first, and later into both arms, and associated headaches (two to three times a day), EX 4 at 16; CX 11 at 65; TR 16; that he has been treated and/or examined by Drs. Hague, Greer, Pojunas, Oates, Steichen, Capen, Williams, Lindberg, Moelleken and Jones, CX 4, 6, 7, 8, 11, 12; EX 2, 4, 5; and that he was paid temporary total disability benefits from May 16, 1994, through November 9, 1995, at a rate of $738.30 per week, and from November 10, 1995 through May 20, 1997, at a rate of $537.20 per week, EX 1 at 2.

The medical evidence on record indicates that from May of 1994 through July of 1994, claimant was treated by Dr. Hague, who diagnosed an acute cervical thoracic strain and recommended physical therapy, CX 4 at 7. From October of 1994 through February of 1995, claimant was treated by Dr. Hugh Greer, who diagnosed him with "cervical osteoarthropathopy with radiculopathy, bilateral, primarily C6 on the left" and headaches, and recommended an MRI, TR at 41; CX 6 at 17.

On October 25, 1994, claimant was examined by Dr. K.W. Pojunas, who reported a "probable annulus bulge at C6-7," CX 6 at 24-25. Also in October of 1994, claimant consulted Dr. Mary K. Oates, who diagnosed him with "severe cervical strain/sprain with secondary myofascial pain and headaches," noted that claimant's exam was consistent with his account of the injury, and recommended that claimant remain at his "off work" status. CX 7 at 29-30.

In February of 1995, claimant was examined by Dr. John Steichen, a neurological surgeon, who diagnosed "left C6 radiculopathy secondary to neural impingement," and a "herniated disc at the C5-6 level," noted that the condition was disabling, and recommended "C5-6 anterior cervical discectomy and fusion." EX 4 at 15; EX 5. Claimant decided not to undergo surgery at that time due to his fear of same. CX 12 at 43; TR 42.

In April of 1995, claimant was examined by Dr. Daniel Capen, who diagnosed claimant with "C5-6 disc herniation with left upper extremity radiculopathy" and a "head concussion syndrome and laceration." CX 8 at 31-34; TR at 41. In August of 1995, claimant was examined by Dr. Richard Williams, who performed a neurologic examination and diagnosed "cervical disc herniation with cervical radiculopathy, C5-6, on the left." CX 9 at 37.

From September of 1995 through January of 1998, claimant was treated by Dr. Cam Lindberg, who diagnosed "cephalalgia [headpain] of uncertain etiology" and "cervical pain syndrome," CX 11 at 44; EX 9 at 372, 374, recommended cervical spine surgery, CX 11 at 46, 65; EX 9 at 330, and who, in November of 1995, March of 1998, and at the hearing, opined that claimant was temporarily, totally disabled. EX 9 at 330.

On January 28, 1998, claimant saw Dr. Alan Moelleken for a spine surgery consultation; he reported that claimant suffers from a "persistent myelopathy worsening over time," noted that symptoms have worsened since 1995, and recommended surgery after further evaluations. CX 12

at 75.

On February 20, 1998, Dr. Thomas Jones performed an "independent medical exam" (IME), and diagnosed claimant with "chronic, posttraumatic, head, neck, shoulder, and arm pain," and recommended surgery. EX 2 at 13. Dr. Jones testified that although claimant may be exaggerating some of the symptoms, he has in fact been chronically disabled, and surgery is probably his "best chance at getting over this." EX 8 at 262. Dr. Jones also noted that the longer one puts off a surgery, the greater likelihood of an unsuccessful surgery. EX 8 at 262.

Additional evidence of record in this case consists of the testimony and records of vocational rehabilitation specialist Mary Barncastle, EX 7, as well as the wage and tax statements of claimant from 1988 through 1994. EX 10-15.

Determination of average weekly wage

The first issue to be determined is claimant's average weekly wage at the time of his May 12, 1994 injury. Section 10 of the Act sets forth three alternative methods, in sections 10(a), (b) and (c), for determining a claimant's average annual earnings; that figure is then divided by 52, pursuant to section 10(d), to arrive at an average weekly wage, which methods are directed towards establishing a claimant's earning power at the time of injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (BRB 1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (BRB 1990). In this case, there is a dispute as to whether section 10(a) or 10(c) should be applied. "Employer's Post-Trial Brief" at 8; "Claimant's Post-Trial Brief" at 5.[6/]

Section 10(a) applies if the employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-136 (BRB 1990); *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1986). "Substantially the whole of the year" refers to the nature of the claimant's employment (whether it is intermittent or permanent), and the amount of time worked. *See Eleazer v. General Dynamics Corp.*, 7 BRBS 75, 79 (BRB 1977); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (BRB 1987); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148, 153-156 (BRB 1979) (finding employment not to be permanent or steady in nature where no work was available for eight weeks).

The employer/carrier argues that section 10(a) is not applicable here because claimant's work as a painter is inherently intermittent, and because claimant worked for only 34.5 weeks during the year preceding the injury, and did not work for substantially the whole of the year preceding the injury. For support, the employer/carrier cites *Duhagan v. Metropolitan Stevedore Co.*, 31 BRBS

[6/] It is clear that section 10(b) is not applicable in that there is a lack of evidence on the earnings of other employees in the same class or in similar employment in the same or a neighboring place, and neither party has argued to the contrary. 33 U.S.C. § 910(b).

98 (BRB 1977) (finding 28 weeks does not constitute "substantially the whole of the year"). It is noted, however, that in *Cipollone v. General Dynamics, Corp.*, 7 BRBS 94 (BRB 1977), *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (BRB 1990) and *Eleazer v. General Dynamics, Corp*., 7 BRBS 75 (BRB 1977), 37 weeks, 34-1/2 weeks and 28 weeks, respectively, were found to constitute "substantially the whole of the year." Considering that claimant here worked five to six days/week for 34.5 weeks during the year prior to his injury, and considering also that the record indicates that his employment as a painter has been substantially steady and full-time from 1986 through 1993, TR 76, I find that his 34.5 weeks of work for the employer prior to his injury was not intermittent and did constitute "substantially the whole of the year." Section 10(a), however, also requires a determination of whether claimant worked five or six days/week prior to his injury. Here, the record is that during his employment with Harbert Yeargin claimant worked approximately five days/week for half of the time, TR at 59, and six days/week for the other half of his employment. Thus, I find that section 10(a) cannot be applied because claimant was neither a five nor a six day/week employee.

Under such circumstances where the methods of subsections (a) and (b) cannot realistically be applied, section 10(c) is applicable, and it requires that I reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. Given that section 10(a) would apply if it could be determined whether claimant was a five or six day/week employee, and in light of the fact that he was a five day/week employee for half the time, and a six day/week employee for half the time, TR at 59, I find that an average of the five day/week section 10(a) calculation[7/] ($58,630) and the six day/week section 10(a) calculation[8/] ($56,376), which produces an average annual earning capacity of $57,503, is fair and reasonable under the meaning of section 10(c). Under Section 10(d), $57,503 is then divided by 52 to arrive at an average weekly wage of $1105.83. 33 U.S.C. §§908(c), 908(d).

Nature and Extent of Disability

The record indicates that temporary total disability benefits were voluntarily paid by the employer/carrier from May 16, 1994, through November 9, 1995, at a rate of $738.30, and from November 10, 1995, through May 20, 1997, at a rate of $537.20, EX 1 at 2. As there is no disputed issue of causation, the first issue to be determined is the nature of claimant's disability, if any, after May 20, 1997. "Claimant's Pre-Trial Brief" at 8. This determination turns on whether claimant's condition since May 20, 1997, has been "permanent" or "temporary". An injured worker's impairment is deemed permanent if the condition has reached maximum medical improvement or if the impairment has continued for a lengthy period of time and appears to be of a lasting or indefinite duration. *Watson v. Gulf Stevedore Corp*., 400 F. 2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *James v. Pate Stevedoring Co.*, 22 BRBS 271, (BRB 1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 60 (BRB 1985). Moreover, the Benefits Review

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[7/] 260 times the average daily wage of $225.50. 33 U.S.C. § 910(a); "Claimant's Pre-Trial Brief" at 2.

[8/] 300 times the average daily wage of $187.92. 33 U.S.C. § 910(a); "Claimant's Pre-Trial Brief" at 2.

Board has held that where no physician concludes that a claimant's condition has reached MMI and further surgery is anticipated, permanency is not demonstrated. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (BRB 1983). The Board has further held that where a claimant undergoes surgery, his condition is permanent only after recovery from that surgery. *Walker v. National Steel & Shipbuilding Co.*, 8 BRBS 525, 528 (BRB 1978); *Edwards v. Zapata Offshore Co.*, 5 BRBS 429, 432 (BRB 1977). In this case the gravity of claimant's injury does not appear to be contested. Therefore, based on the lack of any evidence of record that he has reached maximum medical improvement, and because all treating physicians reported a need for surgery, and at least one indicated that claimant would remain temporarily disabled for the months immediately following surgery, EX 8 at 263, I find that claimant's condition remains temporary within the meaning of the Act.

The next issue is the extent of claimant's injury after May 20, 1997, that is, whether any disability since that date has been "partial" or "total." "Disability" under the Act is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment...." 33 U.S.C. §902(10). "Total disability " has been held to mean complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. *Elliot v. C & P Telephone Co.*, 16 BRBS 89 (BRB 1984). The employee has the initial burden of establishing a prima facie case of total disability by showing that he cannot return to his regular or usual employment as a result of his work-related injury. *Id.* If claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 201-202, 16 BRBS 74 (CRT)(4th Cir. 1984).

Based on the record evidence that the employer here terminated claimant's employment as an industrial painter within a week after the injury and did not provide him with a position he could return to on a full-time basis with duties he could perform within the restrictions imposed by his doctors, TR 72, I find that claimant has established a case of total disability within the meaning of the Act. 33 U.S.C. § 908(b). However, based on the evidence that claimant was retrained as a computer technician, and was able to apply for, accept and perform his job at Haywood Lumbar for a few months in the spring of 1997, TR 17; EX 7, I also find that there were realistically available job opportunities within the geographic area that were within his physical restrictions from the date he completed his vocational rehabilitation and began working at Haywood Lumbar, March 21, 1997, through the date that he left the employ of Haywood Lumbar, June 12, 1997. TR 44. I therefore conclude that from March 21, 1997, through June 12, 1997, claimant's disability is properly characterized as partial, not total, within the meaning of the Act. 33 U.S.C. §908(e).

Section 8(h) mandates a two-part analysis in order to determine claimant's post-injury wage earning capacity. *Devilier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (BRB 1979). The first inquiry requires a determination as to whether his actual post-injury wages fairly and

reasonably represent his wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796 (D.C. Cir. 1984). If the actual wages are unrepresentative of claimant's wage-earning capacity, the second inquiry requires the computation of an exact dollar amount that fairly and reasonably represents such wage-earning capacity. *Id.* at 796-797.

In this case, the employer/carrier argues that the $8.00/hour wage earned by claimant at Haywood Lumbar, in San Luis Obispo, is not representative of his earning capacity based on the testimony of Ms. Barncastle to the effect that he could earn a higher wage in Santa Barbara, and to the effect that his future earnings would increase, EX 7 at 130. I do not give much weight to these arguments because claimant obtained the highest starting wage ($8.00/hour) available in his hometown according to Ms. Barncastle's report, because the report lists only the higher, and not the lower, of starting figures in Santa Barbara, and because the finding of temporary partial disability here is limited to the specific dates of March 21 to June 12, 1997, and not beyond, the potential for higher future earnings is irrelevant to this calculation. For the foregoing reasons, I find that claimant's actual wage at Haywood Lumbar, resulting in an average weekly wage of $320.00 ($8.00/hour times 40 hours/week), does fairly and reasonably represent his wage-earning capacity for that period of time, because the job involved duties within his physical restrictions and utilized skills within his vocational rehabilitation. 33 U.S.C. § 908(h).

I therefore find that for the period of March 21, 1997 through June 12, 1997, claimant was temporarily partially disabled as a result of his work-related injury and is thus entitled to disability compensation at the rate of two-thirds of the difference between his average weekly wage before the injury ($1,105.83) and his weekly wage-earning capacity after the injury ($320.00), which is $523.88 per week. 33 U.S.C. §908(e).

Based on the evidence that claimant's position as computer technician ended on June 12, 1997, and he was unable after sending out several resumes, to secure another similar position within the restrictions imposed by his doctors, TR 62-63; and, based also on the evidence that his condition has worsened over time, TR 64; CX 12 at 75, that he was scheduled for surgery on July 16, 1998, TR 6; "Employer's Post-Trial Brief" at 13, and that at least one physician has projected a period of temporary total disability after the surgery, EX 8 at 263, I find that from June 13, 1997, to the date that claimant reaches maximum medical improvement, claimant remains temporarily totally disabled, and he is entitled to continuing disability compensation at the rate of two-thirds of his average weekly wage ($1,105.83), which is $737.22 per week. 33 U.S.C. §908(b); *see also* 33 U.S.C. §922.

Additional compensation for overdue installment payments

Claimant argues that he is entitled to a "penalty" under section 14(e) of the Act, based on the suspension of benefits from May 20, 1997, through July 16, 1998. "Claimant's Post-Trial Brief" at 9. 33 U.S.C. § 914(e). The purpose of the penalty is to encourage the prompt payment of benefits, to ensure that claimants receive the full amount due, and to act as an incentive to induce employers

to bear the burden of bringing any compensation disputes to the Department of Labor's attention. *Fairley v. Ingalls Shipbuilding*, 22 BRBS 184, 192 (BRB 1989), *aff'd in pert. part, Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 269 (BRB 1984) *on recon.*, 17 BRBS 20 (BRB 1985). The Board has held that in order to escape Section 14(e) liability, the employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (BRB 1981). Because the record here indicates that the employer/carrier stopped paying claimant's compensation as of May 20, 1997, and because there is no evidence of record that the employer/carrier controverted liability or was irreparably injured, I find that claimant is entitled under section 14(e) to additional compensation of 10% of the unpaid compensation from May 20, 1997, through July 16, 1998. As previously determined, from May 20, 1997, to June 12, 1997, about 7.5 weeks, the amount of compensation due is $523.88/week, ten per cent of which is $52.38/week, which totals $392.85. From June 12, 1997, to July 16, 1998, approximately 52.5 weeks, the rate of compensation due is $737.22/week, ten per cent of which is $73.72/week, which totals $3,870.30. Thus, the total additional compensation to which claimant is entitled is $4,263.15. 33 U.S.C. §914(e).

Credit for advance compensation paid

The employer/carrier has requested credit for excess compensation paid to claimant under section 14(j). Section 14(j) allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (BRB 1989), *on recon., aff'd* 23 BRBS 241 (BRB 1990); *see Stevedoring Servs. of America v. Eggert*, 953 F. 2d 552, 556, 25 BRBS 92, 97 (CRT) (9th Cir.), cert. denied, 112 S. Ct. 3056 (1992); *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245, 249 (BRB 1979); *Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710, 712 (BRB 1978) (employer's voluntary payments of temporary total disability credited against award of permanent partial compensation). The employer/carrier here is therefore entitled to a credit for all amounts previously paid to claimant for the period March 21 through May 20, 1997, and since benefits were resumed "at the rate of $537.20 per week because of his surgery" (*see* "Employer's and Insurance Carrier's Post-Hearing Memorandum" at p. 14).[9/]

Attorney's fees and costs

Having obtained an award in claimant's behalf, his reasonable attorney's fees and costs are payable by the employer/carrier. Claimant's counsel may file an appropriate petition for services rendered on or after October 21, 1997, the date when the matter was docketed in the Office of Administrative Law Judges. 33 U.S.C. §928; 20 C.F.R. §702.132-702.134. Within ten days after service of this Decision and Order, counsel for claimant shall initiate a verbal discussion with counsel

[9/] The employer/carrier is also liable for mandatory interest, at the rate(s) prescribed by 28 U.S.C. §1961 (1982), payable on all net amounts owing under this Order for the period from March 21, 1997, forward.

for the employer/carrier in an effort to agree on the amount of such fees. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If they fail to resolve all of their disputes within 20 days after service of this Decision and Order, claimant's counsel shall file his fee petition and serve a copy on opposing counsel, who shall serve any objections within 10 days after the service date of the fee petition. Any item not objected to will be deemed acquiesced in by the employer/carrier. Within 10 days of service of such objection(s), claimant's counsel shall serve a reply thereto. Any objection(s) not replied to within such time will be deemed acquiesced in by claimant.

ORDER

It is therefore ordered that:

1. The employer/carrier shall pay to claimant compensation for his temporary partial disability from March 21 to June 12, 1997, at a weekly rate of $523.88, and for his temporary total disability, from June 13, 1997, forward and continuing at a weekly rate of $737.22. The employer/carrier shall also pay to claimant additional compensation of $4,263.15 under section 14(e) of the Act.

2. The employer/carrier shall take a credit for compensation payments previously made for the periods March 21 through May 20, 1997, and since benefits were resumed because of claimant's surgery; and pay to claimant mandatory interest, at the rate(s) prescribed by 28 U.S.C. §1961 (1982), on any net amounts owing from March 21, 1997, under this Order.

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3. All computations called for by this Decision and Order shall be performed by the District Director.

ALFRED LINDEMAN
Administrative Law Judge

Date: December 11, 1998
San Francisco, California
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